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IN THE

Supreme Court of the United States

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FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS, INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORPORATION, *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMICI CURIAE SENATORS PATRICK LEAHY, ORRIN HATCH, ROBERT TORRICELLI AND CHARLES SCHUMER, REPRESENTATIVES JOHN CONYERS, LINDSEY GRAHAM AND JERROLD NADLER, AND THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the plain language of § 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), precluded the Federal Communications Commission from revoking licenses held by a debtor in bankruptcy solely because such debtor did not make installment payments after filing for bankruptcy.

TABLE OF CONTENTS

INTERESTS OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

A. The Bankruptcy Code Reflects Congress's Balancing Of Numerous Policy Concerns, To Which This Court's Natural Meaning Interpretive Approach Properly Defers 7

B. Congress Has Considered And Rejected FCC Proposals To Exempt Spectrum Licenses From Bankruptcy Code § 525 14

C. The Natural Meaning Of Bankruptcy Code § 525 Accurately Reflects Congress's Intention To Afford FCC Licensees And Their Creditors The Standard Protections Of The Code 21

CONCLUSION 30

TABLE OF AUTHORITIES

CASES **Page(s)**

Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999) 7,16

Butner v. United States, 440 U.S. 48 (1979) 9

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 11

Cooke v. United States, 91 U.S. 389 (1875) 11

Dallas-Fort Worth Reg'l Airport Bd. v. Braniff Airways, 26 B.R. 628 (Bankr. N.D. Tex. 1982) 9

Davis v. Pringle, 268 U.S. 315 (1924) 11

Duffey v. Dollison, 734 F.2d 265 (6th Cir. 1984) 28

In the Matter of Bradley, 989 F.2d 802 (5th Cir. 1993) 28

In re Colon, 102 B.R. 421 (Bankr. E.D. Pa. 1989) 29

Franconia Assocs. v. United States, No. 01-455 (June 10, 2002) 11

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U.S. 152 (1912) 11

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 8

Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n, 997 F.2d 581 (9th Cir. 1993) 9

In re Bastian Co., 45 Bankr. L. Rep. 717 (W.D.N.Y. 1985) 10

In re Bogosian, 112 B.R. 2 (Bankr. D.R.I. 1990) 9

In re Exquisito Servs., Inc., 823 F.2d 151 (5th Cir. 1987) 20

In re Harris, 85 B.R. 858 (S.D. Fla. 1994) 19

TABLE OF AUTHORITIES (cont.)

CASES (cont.) **Page(s)**

In re Island Club Marina, Ltd., 38 B.R. 847 (N.D. Ill. 1984) 19

In re Mason, 18 B.R. 817 (Bankr. W.D. Tenn. 1982)..... 19

Kawaauhau v. Geiger, 523 U.S. 57 (1998)..... 8

Kokosca v. Belford, 417 U.S. 642 (1974) 16

Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)..... 24

Lubrizol Enters. v. Richmond Metal Finishers, 756 F.2d 1043 (4th Cir. 1985)..... 9

Meyer v. Comm'r, 383 F.2d 883 (8th Cir. 1967) 9

Missouri v. United States Bankruptcy Court, 647 F.2d 768 (8th Cir. 1981)..... 13

Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) 11

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984)..... 9

Ohio v. Kovacs, 469 U.S. 274 (1985) 12,22

Palmore v. Sidoti, 466 U.S. 429 (1984)..... 24

Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990)..... 9,12,21,22

Pennsylvania Peer Review Org. v. United States (In re Pennsylvania Peer Review Org.), 50 B.R. 640 (Bankr. M.D. Pa. 1985)..... 9

Perez v. Campbell, 402 U.S. 637 (1971)..... 26

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)..... 24

Rake v. Wade, 508 U.S. 464 (1993)..... 8,9

TABLE OF AUTHORITIES (cont.)

CASES (cont.) **Page(s)**

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Union Bank v. Wolas, 502 U.S. 151 (1991)..... 8

United States v. Estate of Romani, 523 U.S. 517 (1998)..... 11

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)..... 7,10,12

United States v. National Exchange Bank, 270 U.S. 427 (1926)..... 11

United States v. Ron Pair Enterps., Inc., 489 U.S. 235 (1989)..... 7,8

United States v. Vecchio (In re Vecchio), 20 F.3d 555 (2d Cir. 1994)..... 9

United States v. Whiting Pools, Inc., 462 U.S. 197 (1983)..... 12,16

United States v. Winstar Corp., 518 U.S. 839 (1996)..... 11

United States Trustee v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys., Inc.), 33 F.3d 294 (3d Cir. 1994) 9

Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990) 24

STATUTES

7 U.S.C. § 204..... 13

11 U.S.C. § 101(5)(A)..... 21

11 U.S.C. § 101(12) 21

11 U.S.C. § 362(b)(4)..... 12

11 U.S.C. § 362(b)(8)..... 13

TABLE OF AUTHORITIES (cont.)

STATUTES (cont.) **Page(s)**

11 U.S.C. § 362(b)(12) 13

11 U.S.C. § 362(b)(13) 13

11 U.S.C. § 362(b)(16) 13

11 U.S.C. § 507(a)(8) 12

11 U.S.C. § 523(a)(1) 12

11 U.S.C. § 523(a)(8) 23

11 U.S.C. § 525 ..... *passim*

47 U.S.C. § 309(j) ..... *passim*

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 9

Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 9

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Bankruptcy Tax Act of 1980, Pub. L. No 96-589, 94 Stat. 3389 9

Comprehensive Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, 100 Stat. 82 10

Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 9

Intellectual Property Protection Act of 1988, Pub. L. No. 100-506, 102 Stat. 2538 9

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Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972 10

OTHER LEGISLATIVE MATERIALS

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Letter from Hon. Tom Bliley, Hon. John D. Dingell, Hon. W.J. "Billy" Tauzin, Hon. Edward J. Markey, Hon. Henry J. Hyde, Hon. John Conyers, Jr., Hon. George W. Gekas, Hon. Jerrold Nadler, Hon. Richard K. Armey, and Hon. Richard J. Gephardt to Hon. William J. Clinton, Nov. 4, 1999 15,18

TABLE OF AUTHORITIES (cont.)

OTHER LEGISLATIVE MATERIALS (cont.) **Page(s)**

Letter from Hon. Tom Bliley, Hon W.J. "Billy" Tauzin, Hon. John D. Dingell, and Hon Edward J. Markey to Hon. Newt Gingrich, Hon. Richard A. Gephardt, Hon. Erskine Bowles, Hon. Bob Livingston, and Hon. David R. Obey, Oct. 15, 1998 15,17

Letter from Hon. Henry J. Hyde, Hon. George W. Gekas, Hon. John Conyers, Jr. and Hon. Jerrold Nadler to Hon. Bill Young, Hon. Harold Rogers, Hon. David R. Obey, and Hon. Jose E. Serrano, July 21, 1999 15

Letter from Hon. Orrin Hatch to Hon. Trent Lott, Oct. 19, 1998 15

Letter from Hon. Kay Bailey Hutchinson and Hon. Max Cleland, July 16, 1999 15

Letter from Hon. Robert J. Torricelli to Hon. Trent Lott, Oct. 18, 2000 15,17

OTHER AUTHORITIES

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This brief *amici curiae* is respectfully submitted in support of respondents, with the written consent of both parties.[1]

INTERESTS OF AMICI

The *amici* members of Congress are Senator Patrick Leahy, Senator Orrin Hatch, Senator Robert Torricelli, Senator Charles Schumer, Representative John Conyers, Representative Lindsey Graham, and Representative Jerrold Nadler. The congressional *amici* are a bipartisan group of Senators and Representatives with particular responsibility for and interest in the administration of the statutes at issue in this case. The legislative duties of the congressional *amici* include primary responsibility for balancing the many policies expressed in the Bankruptcy Code and the interests affected by it. Section 525 of the Code reflects such a balancing: consistent with the Code's overarching goal of providing debtors an opportunity for a fresh start, § 525 establishes a narrow but important check on the power of government to withhold or revoke needed licenses from debtors in bankruptcy. In the exercise of its responsibility to supervise the policy balances in the Code, Congress has previously considered and rejected proposals that would establish a narrow exemption from § 525 for licenses issued by the FCC. *Amici* strongly believe that, as this Court's precedents have repeatedly declared, the task of balancing the many, finely-calibrated interests at stake in the Bankruptcy Code is committed exclusively to Congress, and where Congress has spoken plainly to an issue in the Code, the courts should not construe the Code differently for asserted policy reasons.

It is the experience of the congressional *amici* that where sound policy requires an exception to a general rule in the

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[1] Letters of consent have been filed with the Clerk. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

Code to serve the interests of government, Congress typically acts in responsible bipartisan fashion to create the needed exception. The task of balancing the different policies and interests reflected in the Code becomes more difficult when courts ignore those balances in favor of different policy judgments. The congressional *amici* therefore have a strong interest in the continuation of this Court's practice of interpreting the Code strictly as written.

Amicus Association of Communications Enterprises ("ASCENT") is an association of entrepreneurial and small business communications companies. Many of ASCENT's members are resellers of wireless services and are wholly dependent on existing facility-based wireless carriers as sources of supply. ASCENT's interest in this case arises out of the impending sunset of the FCC's "wireless resale rule" in November 2002 – which may terminate the FCC's rules requiring mandatory resale of wireless service. ASCENT is greatly concerned that the sunset of that rule will close off existing sources of supply and severely limit resale opportunities. Respondent NextWave proposes to build out a nationwide wireless PCS network and intends to offer its services on a wholesale basis to other carriers, resellers and mobile virtual network operators. NextWave's strategy of acting as a "carrier's carrier" will afford ASCENT's members continued opportunity to offer wireless services on a resale basis, even after the impending wireless resale sunset, and will encourage greater competition and consumer choice. ASCENT's members therefore share the interest of the congressional *amici* in enforcement of the plain text of § 525, which affords protection not only for debtors such as NextWave, but also for creditors and others, such as ASCENT's members, whose own businesses are closely related to the debtor's and may be deeply affected by the preservation of government licenses and similar assets critical to the debtor's financial viability.

SUMMARY OF ARGUMENT

Section 525 of the Bankruptcy Code bars a government agency from revoking a license solely because of the licensee's failure to pay a debt dischargeable in bankruptcy. Respondent NextWave's licenses were revoked because it failed to satisfy a payment obligation to the government on which the license was conditioned. The heart of the FCC's position in this case is the proposition that because those payment obligations served the FCC's "regulatory purposes," the licenses were properly revoked, despite the § 525 bar. The FCC is wrong. To the extent those payments served regulatory purposes – and there is no genuine dispute that they served other purposes as well, primarily revenue collection – the existence of such purposes does not carve respondent out from the explicit protection of § 525.

A. The Bankruptcy Code is a reticulated statute, crafted and refined through bipartisan legislative action. Congress drafted the initial language after years of work to balance numerous competing policy interests, and has amended the Code at various times over the years to reflect revisions in the policy judgments underlying the Code's language. Congress has understood that, because of the reliance interests that develop around the legal rules established by a commercial statute of this nature, it is especially important that Congress's policy judgments be reflected in the plain text of the Code. Recognizing and respecting the primacy of Congress in the establishment of bankruptcy policy, this Court's cases have consistently presumed that the text reflects Congress's considered policy judgments, and have hewed closely to the natural meaning of the text in applying Code provisions. Contrary to the premises of the FCC's argument, the Court has not applied its own policy gloss to the text, nor has it accorded presumptively favorable treatment to government entities such as the FCC. The Court has understood that where sound policy demands a special exemption from the opera-

tion of the bankruptcy laws for government entities, Congress can and will provide it.

B. Congress has repeatedly considered – and rejected – proposals to confer such an exemption from the operation of § 525 on licenses issued by the FCC. Members of Congress from both parties believed that depriving entities with FCC licenses of the protections of § 525 would contradict the fundamental policy of the Bankruptcy Code of allowing all debtors a fresh start, would unfairly favor the FCC over other creditors with significant financial interests at stake in the debtor's estate, and would undermine the ability of small businesses to generate the capital and financing necessary to facilitate their participation in license auctions. Though Congress rejected a narrow exemption for the FCC on those bases, what the FCC proposes here is more sweeping – an effective exemption from § 525 for *all* government agencies and *all* government licenses, so long as the agency can articulate some regulatory purpose for its licensing decisions. Given the broad impacts such a rule would have on the reliance interests of government licensees and their creditors throughout the economy, there is even less justification for impressing such a policy onto the Code by judicial fiat than for adopting a narrow FCC exemption by proper legislative amendment.

C. There is no doubting that adoption of the FCC's position here would require deviation from the plain text of § 525 – and therefore deviation from the policy judgments Congress made both in crafting § 525 and in rejecting the FCC's efforts to obtain special treatment under the provision. Respondent's license payment obligation plainly is a "debt" that is "dischargeable" in bankruptcy. It is equally clear that the FCC revoked the licenses "solely because" respondent failed to make payments on that debt. The FCC says that failure to make payments is a proxy for its interest in identifying licensees with the financial and other resources to develop the spectrum, but the undisputed fact is that if respondent had made its payment, the FCC would *not* have revoked the licenses, regardless of respondent's actual financial viability or spectrum development progress. And, finally, nothing in § 309(j) of the Communications Act required the FCC to make late payments the sole trigger for outright revocation of a license. Section 525 applies here not only because of a policy judgment by Congress favoring protection for debtors and creditors, but also because the FCC elected to base license revocation solely on the failure to make payments, rather than to impose any of a variety of other possible license requirements that would have served its spectrum-regulation interests equally well.

ARGUMENT

The licenses at issue in this case were automatically revoked by the FCC when the licensee, respondent NextWave, failed to make timely installment payments to the FCC while reorganizing under the bankruptcy laws. The question here is whether § 525 of the Bankruptcy Code prohibits the FCC from conditioning respondent's possession of its licenses on the timely satisfaction of each installment payment obligation, once respondent entered bankruptcy. Section 525 provides, in pertinent part, that "a governmental unit may not . . . revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title . . . ." 11 U.S.C. § 525(a).

The FCC contends that revocation of the licenses for failure to make timely installment payments was proper under § 525 – or despite § 525 – merely because "the FCC enforces the full and timely payment condition for regulatory reasons." FCC Br. 37. Those reasons are essentially that the FCC presumed that the highest bidder would be "the 'best' licensee," and that "the bidder's failure to make timely payment" – to miss even one payment, that is – "is fatal to its

implicit representation that it is the 'best' of the potential licensees," in terms of putting the spectrum to full use in the public interest. *Id.*

At t[illegible] turn of every statutory phrase, the FCC offers this same argument for why § 525 is inapplicable. The license payment obligation is not a "debt," the FCC says, because it serves the FCC's regulatory purposes. The obligation is not "dischargeable" in bankruptcy, the FCC says, because it serves the FCC's regulatory purposes. And the license was not revoked "solely because of" respondent's failure to pay, the FCC says, because revoking the license for failure to pay serves the FCC's regulatory purposes. Nor does the FCC's reliance on this argument stop with the text of the statute. Whatever § 525's meaning for the revocation of licenses in other cases and contexts, the FCC suggests, it should be construed in the FCC's favor here because to do otherwise would put § 525 in conflict with another statute – the Communications Act – that establishes the regulatory purposes the FCC sought to serve by revoking the licenses.

As we elaborate below, *infra* at 21-30, this "regulatory purposes" defense fails at every step of the analysis, from the statutory text through to the policies the FCC cites. We begin, however, by addressing a key premise underlying the FCC's claims: this Court should construe § 525 to reflect not so much the natural meaning of its text, but rather the policies underlying § 309(j) of the Communications Act. As we show, this proposed interpretive mode is inconsistent with this Court's standard approach of construing the Code strictly, an approach that properly leaves to Congress the legislative task of drafting the Code to reflect the appropriate balance of competing policy objectives. To deviate from that approach in this case would be especially inappropriate, inasmuch as Congress has considered – and explicitly rejected – the very policy choice the FCC now asks this Court to graft onto § 525.

A. The Bankruptcy Code Reflects Congress's Balancing Of Numerous Policy Concerns, To Which This Court's Natural Meaning Interpretive Approach Properly Defers

1. The Bankruptcy Code was "long and minutely contemplated" by Congress before its enactment in 1978. *Bank of America Nat'l Trust v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 450 (1999). Members of Congress from both parties worked together "for nearly a decade" to formulate the Code, *United States v. Ron Pair Enterps., Inc.*, 489 U.S. 235, 241 (1989), in an effort "to bring an entire area of law under a single, coherent statutory umbrella," *203 North LaSalle*, 526 U.S. at 461 (Thomas, J., concurring); *see generally* Klee, Legislative History of the New Bankruptcy Law (1979) (detailing bipartisan process of drafting and enacting Code), *reprinted in* Collier on Bankruptcy, App. Pt. 4, 199-215 (15th ed. rev. 2002). While the process of legislating on any subject can be very difficult, and may sometimes result in compromises that lead to less rather than more textual clarity, the Bankruptcy Code is in many ways a unique statute. Years of bipartisan efforts to develop a sensible and coherent Code at the beginning, followed by continuous efforts to respond in the same vein to issues and problems that have arisen during the Code's application, have produced a largely workable balancing of the many competing interests involved. *See 203 North LaSalle*, 526 U.S. at 461 (Thomas, J., concurring) (noting only "rare instances when the Code is truly ambiguous"). Coherence – or at least understandability – is especially desirable in a commercial statute of this nature, for its operation affects the value of every investment in enterprises that are entitled to avail themselves of the law's protections. As this Court has recognized, the interests of those who lend or invest capital in an entity in reliance on the terms of the Code underscore the importance of applying the Code strictly in accordance with those terms. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739 (1979) (declining to

accord government special priority for its loan liens in part because of other creditors' reliance interests).

2. This Court's cases thus consistently reflect the presumption that the plain text of the Code reflects Congress's considered judgment as to how given bankruptcy policy interests are best balanced. That is why this Court will apply the "natural reading" of the text of the Code, *even if* the Court believes bankruptcy policy would be better served otherwise. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000). As the Court elaborated in *Hartford Underwriters*:

> We do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome . . . is a task for Congress, not the courts.

Id. Thus the mere fact "that Congress may not have foreseen all the consequences of a statutory enactment [in the Code] is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991); *see id.* at 162 ("Whether Congress has wisely balanced the sometimes conflicting policies underlying [the Code] is not a question that we are authorized to decide."). Other decisions of this Court reflect this commitment to applying the most natural reading of the Code's text, rather than a construction derived from a preferred policy outcome. *See Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998); *Rake v. Wade*, 508 U.S. 464, 473 (1993); *Toibb v. Ratliff*, 501 U.S. 157, 164 (1991); *Ron Pair*, 489 U.S. at 241.

3. The validity of the presumption that Congress is fully capable of ensuring that the Code's text reflects Congress's considered policy views is amply confirmed by the history of continued bipartisan efforts to refine the Code since its original enactment. In particular, Congress has proved itself willing and able to adjust the Code, or other statutes, as needed to respond to issues raised in bankruptcy-related litigation at all levels. Thus, Congress has amended relevant statutes in response to decisions by this Court,[2] the federal courts of appeals,[3] and the bankruptcy courts.[4] One article identifies no

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[2] *See, e.g., Rake, supra* (home mortgage interest), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 305, 108 Stat. 4106, 4134; *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990) (dischargeability of criminal restitution obligations), *superseded by* Crime Control Act of 1990, Pub. L. No. 101-647, § 3102(b), 104 Stat. 4789, 4916, *re-amended by* Bankruptcy Reform Act of 1994, *supra*, § 302, 108 Stat. at 4132; *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (rejection of collective bargaining agreements), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390; *Butner v. United States*, 440 U.S. 48 (1979) (mortgagee's security interest in rents), *superseded* by Bankruptcy Reform Act of 1994, *supra*, § 214(a), 108 Stat. at 4126.

[3] *See, e.g., United States Trustee v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294 (3d Cir. 1994) (absent bond trustee investments), *superseded by* Bankruptcy Reform Act of 1994, *supra*, § 210, 108 Stat. at 4125; *Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n*, 997 F.2d 581 (9th Cir. 1993) (state regulators' exception from automatic stay), *superseded by* Omnibus Consolidated and Emergency Appropriations Act of 1998, Pub. L. No. 105-277, § 603, 112 Stat. 2681, 2681-86; *United States v. Vecchio (In re Vecchio)*, 20 F.3d 555 (2d Cir. 1994) (status of late filed priority claims), *superseded by* Bankruptcy Reform Act of 1994, *supra*, § 213, 108 Stat. at 4125-26; *Lubrizol Enters. v. Richmond Metal Finishers*, 756 F.2d 1043 (4th Cir. 1985) (nondebtor licensee rights), *superseded by* Intellectual Property Protection Act of 1988, Pub. L. No. 100-506, § 1, 102 Stat. 2538, 2538; *Meyer v. Comm'r*, 383 F.2d 883 (8th Cir. 1967) (corporate profits), *superseded by* Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, 94 Stat. 3389, 3406 (1980).

[4] *See, e.g., In re Bogosian*, 112 B.R. 2 (Bankr. D.R.I. 1990) (Bankruptcy Rule 4001(a)(2) time limits not enforceable in lift stay proceeding), *superseded by* Bankruptcy Reform Act of 1994, *supra*, § 101, 108 Stat. 4106, 4107; *Pennsylvania Peer Review Org. v. United States (In re Pennsylvania Peer Review Org.)*, 50 B.R. 640 (Bankr. M.D. Pa. 1985) (assumption of personal services contracts), *superseded by* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 283(e), 100 Stat. 3088, 3117; *Dallas-Fort*

fewer than fifty-eight bankruptcy-related judicial decisions that Congress has addressed directly to provide for desired treatment of particular issues or parties in bankruptcy proceedings. *See* Bussel, Textualism's Failures: A Study of Overruled Bankruptcy Decisions, 53 Vand. L. Rev. 887, 902, 930-38 (2000).

As the title of that article suggests, its author draws from these "legislative overrulings" the lesson that this Court's practice of adhering to the natural meaning of the Code is an inappropriate approach to construing the Code. The opposite is true. As we have explained, the history establishes that when this Court simply applies the natural meaning of the text, it both respects reliance interests accumulated on the basis of that text, and it leaves for Congress the opportunity to assess whether the text reflects the proper balancing of judgments. The practice also allows Congress to respond with much more precision in textual adjustment than a court can wield in applying a general policy gloss to the statutory text. *See generally Kimbell Foods*, 440 U.S. at 739-40 ("Because the ultimate consequences of altering settled commercial practices are so difficult to foresee, we hesitate to create new uncertainties, in the absence of careful legislative deliberation."). Bankruptcy law and policy are much better served when the courts hew closely to the text of the Code, and leave to the legislative branch the responsibility and opportunity to fine-tune that text as necessary – and, it is important to add, only to the extent necessary.

Worth Reg'l Airport Bd. v. Braniff Airways, 26 B.R. 628 (Bankr. N.D. Tex. 1982) (rejection of airport facilities leases), *superseded by* Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, § 19(b), 106 Stat. 972, 982; *In re Bastian Co.*, 45 Bankr. L. Rep. 717 (W.D.N.Y. 1985) (rejection of pension plan), *superseded by* Comprehensive Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, § 11007(a), 100 Stat. 82, 244 (1986).

4. In addition to the "policy-interpretive" approach underlying the FCC's position, the FCC also rests its argument on the implicit premise that the Bankruptcy Code presumptively privileges government and the exercise of its regulatory functions. That notion is quite wrong: this Court's cases for decades have correctly observed that Congress presumptively treats the government under the bankruptcy laws "like any other general creditor." *United States v. Estate of Romani*, 523 U.S. 517, 531 (1998) (citing *Davis v. Pringle*, 268 U.S. 315 (1924); *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152 (1912)). Such treatment is consistent with the approach both Congress and this Court typically take toward the government when it engages in commercial transactions of any kind. *See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) ("When the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (internal quotations marks omitted)); *United States v. Winstar Corp.*, 518 U.S. 839, 893-94 (1996) (plurality op.) (rejecting government argument that law "enacted to govern regulatory policy and to advance the general welfare" is automatically exempted from standard operation of contract rules); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms.") (quoting *United States v. National Exchange Bank*, 270 U.S. 427, 534 (1926) (Holmes, J.)); *Cooke v. United States*, 91 U.S. 389, 396 (1875) ("when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances"); *see also Franconia Assocs. v. United States*, No. 01-455 (June 10, 2002) (applying foregoing principles in declining to adopt reading of Tucker Act provision that would treat government more favorably than similarly-situated private parties).

The basis for this presumption is unassailable: as the history, discussed above, of Congress's response to judicial decisions demonstrates, when the government needs special treatment in certain business transactions that reflect or serve particularly important regulatory goals, Congress can and does provide the necessary protections. Indeed, several provisions of the Bankruptcy Code do provide for special or preferred treatment for the Government as a creditor in bankruptcy. *See, e.g.*, 11 U.S.C. § 507(a)(8) (priority for unsecured tax claims); *id.* § 523(a)(1) (nondischarge of certain tax liabilities); *see also infra* at 13 (citing specific exceptions to automatic stay for certain types of debts to government). These are the exceptions that literally prove the rule: unless the Code or other laws explicitly provide for special treatment in bankruptcy court for government claims, such claims receive no privilege merely because they are backed by some valid regulatory purpose. *See, e.g., United States v. Whiting Pools, Inc.*, 462 U.S. 197, 209 (1983) ("We see no reason why a different rule should obtain when the IRS is the creditor. . . . Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien."); *see also Pennsylvania Pub. Welfare Dep't v. Davenport*, 495 U.S. 552 (1990) (no special treatment for restitution obligation in absence of specific Code exception); *Ohio v. Kovacs*, 469 U.S. 274 (1985) (same for monetized environmental clean-up obligation); *cf. Kimbell Foods*, 440 U.S. at 734 (declining "unreflective extension of rules [priority of tax liens] that immunize the United States from the commercial law governing all other secured creditors").

Even where Congress *has* released governmental units from certain constraints of bankruptcy law, such exceptions are narrowly tailored and carefully circumscribed. These include the "police and regulatory powers" exception to the automatic stay provision of the Code, 11 U.S.C. § 362(b)(4).

To maintain an adequate shield for debtors, congressional sponsors made clear that § 362(b)(4) is to "be given a narrow construction," applying only to "actions to protect the public health and safety" and not "to actions . . . to protect a pecuniary interest." 124 Cong. Rec. H11,092 (Sept. 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. S17,409 (Oct. 6, 1978) (statement of Sen. DeConcini); *see, e.g., Missouri v. United States Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981) (§ 362(b)(4) does not allow government creditor to enforce regulations concerning operation and liquidation of insolvent public grain elevators that conflict with bankruptcy court's authority, even though regulations motivated in part by regulatory aims). Recognizing the narrow scope of this exception, some federal agencies over the years have sought – and Congress has provided – more specific exceptions from the automatic stay rule. Those exceptions explicitly exempt the collection efforts of specified agencies for certain kinds of debts – efforts with clear regulatory aims that nonetheless did not qualify as exercises of "police or regulatory powers" under § 362(b)(4). *See* 11 U.S.C. § 362(b)(8) (foreclosure on certain HUD mortgages); *id.* § 362(b)(12)&(13) (foreclosure on ship mortgages held under the Merchant Marine Act); *id.* § 362(b)(16) (federal student loan program eligibility determinations).

Congress has even seen fit to provide exemptions in the terms of § 525 itself for certain types of government licenses. *See* 11 U.S.C. § 525 (exempting licenses and grants under Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499(a) *et seq.*; under Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181 *et seq.*; and under 7 U.S.C. § 204). As the next section shows, the FCC has repeatedly – and unsuccessfully – sought similar special treatment for FCC licenses in bankruptcy proceedings.

B. Congress Has Considered And Rejected FCC Proposals To Exempt Spectrum Licenses From Bankruptcy Code § 525

As noted above, the FCC's position in this litigation is fundamentally premised on the assertion that the power to revoke the licenses of a debtor in bankruptcy who misses a payment is necessary to enforce the policies underlying § 309(j) of the Communications Act. *See supra* at 5-6. But the FCC has already sought precisely that authority from Congress, in a variety of forms, including a specific amendment to § 309(j) itself. Those proposals generated bipartisan opposition and were repeatedly rejected. Their consistent failure demonstrates that Congress, which of course established the very § 309 policies on which the FCC now relies, does not share the FCC's view that those policies support special treatment for its licenses under § 525.

1. Consecutive Congresses have considered Administration proposals that would have amended the auction provisions of the Communications Act, 47 U.S.C. § 309(j), to exempt FCC licenses altogether from the operation of § 525. The proposed amendment, which appeared in several bills, read in relevant part: "Title 11 . . . shall not apply . . . to the Commission . . . with respect to . . . and act by the Commission to issue, deny, cancel, or transfer control of . . . a license or permit." H.R. 4690 § 618, 106th Cong. (2000); H.R. 2670 § 618, 105th Cong. (1999).

Opposition to this proposal was strong and bipartisan. In November 1999, ten members of the House, including Majority Leader Armey and Minority Leader Gephardt, as well as the chairmen and ranking members of four governing committees and subcommittees, sent a letter to the President warning that granting the FCC authority to "seize in bankruptcy proceedings radio licenses previously issued to telecommunications companies . . . would be contrary to both current telecommunications policy and bankruptcy law."

Letter from Hon. Tom Bliley, Hon. John D. Dingell, Hon. W.J. "Billy" Tauzin, Hon. Edward J. Markey, Hon. Henry J. Hyde, Hon. John Conyers, Jr., Hon. George W. Gekas, Hon. Jerrold Nadler, Hon. Richard K. Armey, and Hon. Richard J. Gephardt to Hon. William J. Clinton, Nov. 4, 1999 ("Nov. 4, 1999 Letter"). In another letter, Republican and Democratic leaders of the House Commerce Committee argued that the proposal would "fundamentally alter the bankruptcy protections" available to FCC licensees, with "unintended consequences" that could "significantly upset market equities and constitute bad economic policy." Letter from Hon. Tom Bliley, Hon W.J. "Billy" Tauzin, Hon. John D. Dingell, and Hon Edward J. Markey to Hon. Newt Gingrich, Hon. Richard A. Gephardt, Hon. Erskine Bowles, Hon. Bob Livingston, and Hon. David R. Obey, Oct. 15, 1998, at 2 ("Oct. 15, 1998 Letter"). And leaders of the Judiciary Committee from both parties contended that the proposal would "endow[] the FCC with more protections than virtually any other creditor, including the Internal Revenue Service, has under current bankruptcy law," and could "potentially destroy a [licensee] debtor's prospect for economic rehabilitation and deprive creditors of a major source of repayment." Letter from Hon. Henry J. Hyde, Hon. George W. Gekas, Hon. John Conyers, Jr. and Hon. Jerrold Nadler to Hon. Bill Young, Hon. Harold Rogers, Hon. David R. Obey, and Hon. Jose E. Serrano, July 21, 1999, at 2.[5]

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[5] *See also* Letter from Hon. Orrin Hatch to Hon. Trent Lott, Oct. 19, 1998 (describing FCC proposal as "backdoor attempt to effectively make the protections afforded by the bankruptcy laws ineffective when the FCC is in the position of creditor in bankruptcy court"); Letter from Hon. Robert J. Torricelli to Hon. Trent Lott, Oct. 18, 2000 ("Torricelli Letter") ("It is unreasonable . . . for the FCC to conclude that its licensees should be denied the rights afforded to all by the bankruptcy laws to cure defaults, reorganize, and emerge as a viable enterprise. Such a conclusion is both inequitable and antithetical to Congress' original intent regarding the protection of small business' access to spectrum."); Letter from Hon.

tions. As Representative Graham put the point bluntly, "Who in the world would lend money to a radio or TV station that bought some spectrum at the auction if you could just come in there at any moment and just take the thing over?" Limits On Regulatory Powers Under the Bankruptcy Code, Hrng. Before Subcomm. Commercial and Admin Law of House Comm. on Judiciary, 106th Cong., 2d Sess. 47 (April 11, 2000); *see also id.* at 55 (Rep. Graham) ("My concern is that if we go the route you want us to, that the private sector is going to be very adversely affected, and if you don't honor these pecuniary relationships in some fair way to the rest of the creditors in the world who deal with these people, that the Government is going to destroy the ability for these people to succeed at small businesses . . . or buy spectrum licenses. And I just think that would be devastatingly bad for the economy . . . ."); Nov. 4, 1999 Letter, *supra* ("Start-up telecommunications providers will not be able to attract the capital investment they so desperately need if their most valuable asset is subjected to a perfected, first priority security interest of the Federal Government."); Torricelli Letter, *supra* (changing statute to allow FCC to seize licenses of providers in bankruptcy would be "antithetical to Congress' original intent regarding the protection of small business' access to spectrum.").

That concern was well-founded, as evidenced by what the FCC asks the Court to do here. The FCC itself recognized that one of the central causes of concentration in spectrum ownership was comparatively inadequate capital available to non-incumbent providers. FCC Br. 3-4. To compete successfully in the auctions, and in the development of the spectrum, new entrants had to obtain financing and investments premised on the expected value of the license. An inherent part of the license-value calculation would have been the likelihood of loss or revocation. The FCC would now apply to these struggling new entrants an automatic "one-strike-and-you're-out" revocation policy – no matter how

much work has been done to get the business going, and no matter how many installment payments have been made on the license bid price, the FCC would "automatically cancel" the license of any entity that missed even one payment. Even worse, the regulation makes no apparent provision for return of all or part of previous installment payments. If a new entrant missed the last payment by a month or a week or a day, the FCC would revoke its license *and* keep its money, leaving the entity essentially valueless in many cases. There can be little doubt that, had Congress changed the law to authorize the "one strike" license cancellation policy the FCC now seeks to enforce, potential investors would have been strongly discouraged from investing at all, or strongly encouraged to put a huge price on capital debt or equity.[6] As congressional opponents of special treatment for the FCC understood, either consequence would disserve § 309(j)'s goals of facilitating spectrum ownership by smaller, new entrants to the business.

3. Finally, it bears emphasis that the policy gloss the FCC asks this Court to impose on § 525 is markedly broader than the specific exemption the FCC sought from Congress. By its terms § 525 applies to any "license, permit, charter, franchise or other grant" from any "governmental unit." Section 525's protections thus extend to debtors with real estate licenses, *e.g.*, *In re Harris*, 85 B.R. 858 (S.D. Fla. 1994), liquor licenses, *e.g.*, *In re Mason*, 18 B.R. 817 (Bankr. W.D. Tenn. 1982), building permits, *e.g.*, *In re Island Club*

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[6] *Cf.* Able, "Hot Goods" Liability: Secured Creditors and the Fair Labor Standards Act, 87 Colum. L. Rev 644, 652 (1987) (regulation may "increase[] the risk – and therefore the cost – of credit"); Note, Unsecured Creditors of Failed Banks: It's Not a Wonderful Life, 104 Harv. L. Rev. 1052, 1069-70 (1991) (noting that "even the possibility" of arbitrary exercise of FDIC discretion in bank regulation could "hamper the ability of ailing networks to obtain additional credit," which "would increase the cost of that credit, and the FDIC could find even more institutions in its charge").

Marina, Ltd., 38 B.R. 847 (N.D. Ill. 1984), and food franchises, *e.g.*, *In re Exquisito Servs., Inc.*, 823 F.2d 151 (5th Cir. 1987). What the FCC sought from Congress was an exemption from § 525 *only* for licenses issued by the FCC. What the FCC in effect seeks from this Court is an exemption from § 525 for *all* licenses and other grants issued by *all* governmental agencies, so long as the agency can identify some regulatory purpose supporting the license and its revocation. We can be certain, however, that the regulatory purposes the FCC cites as urgent here would not be as urgent in all cases. And yet the FCC proposes no principled basis on which the Court could hold that FCC licenses are broadly exempt from § 525, but licenses, permits and franchises issued by other agencies are not. By contrast, that is exactly the kind of decision Congress is well-equipped to make, i.e., which kinds of licenses deserve special treatment under § 525, and under what circumstances. A decision by this Court accepting the FCC's argument here would tear a wide hole through the Code, fundamentally altering the bankruptcy rights of government license-holders everywhere, with no contextual appreciation of the need to alter those rights.[7]

Judicial adoption of the policy rejected by Congress thus would not only rework the balance struck by Congress be-

[7] There would also be unpredictable "ripple" effects throughout the Code if the Court adopted other arguments the FCC is making. The terms of art "debt" and "dischargeable," for example, are fundamental concepts animating much of the Code's operation. If the Court were to interpret those terms to exclude from § 525 the payment obligation here simply because it reflects a regulatory function, that interpretation presumably would apply to all uses of those terms in the Code. It is impossible to predict the number and nature of transactions that would be affected by such an interpretation of dischargeable debt. At a minimum, it is clear that such an approach would wreak havoc on the baseline rule that the government should be treated like any other creditor, subject only to limited exceptions specified clearly in the Code.

tween the regulatory interest in licensing and the bankruptcy law interest in protecting debtors and creditors. It would also do so without any sense of the true force of the government's interest in all the cases that would be affected by the ruling. The broad sweep of the ruling would thus compound the already serious unfairness of imposing a retroactive change; it would upset expectations not only of FCC licensees and their creditors, but also those of many other government licensees and their creditors. Avoiding such compound and unpredictable results is precisely why this Court properly leaves bankruptcy policy judgments to Congress.

C. The Natural Meaning Of Code § 525 Accurately Reflects Congress's Intention To Afford FCC Licensees And Their Creditors The Standard Protections Of The Bankruptcy Code

Section 525 is, quite plainly, an explicit limitation on the authority of all government agencies to exercise their regulatory power to grant, deny, and revoke government licenses. The FCC nevertheless argues without a hint of irony that § 525 is inapplicable precisely *because* its license revocation reflects the exercise of regulatory power. That argument cannot be reconciled with the plain text of § 525, which – as Congress has already adjudged in rejecting the FCC's efforts to obtain an exemption – is also fully consistent with relevant Bankruptcy Code and Communications Act policies.

1. The FCC relies on its "regulatory purposes" argument to escape the force of each element of § 525. Those efforts are unavailing.

a. The FCC first argues that "[b]ecause the payment obligations in the licenses are regulatory conditions, they are not debts" under § 525. FCC Br. 30. A "debt" under the Code is a "liability on a claim," 11 U.S.C. § 101(12), and a "claim" is a "right to payment," *id.* § 101(5)(A). In *Davenport*, *supra*, this Court held that a restitution obligation im-

posed in a criminal proceeding, though obviously supported by the regulatory purposes of compensating crime victims and deterring misconduct, was nevertheless a "debt" within the meaning of the Code:

> [T]he language employed to define "claim" . . . makes no reference to purpose. The plain meaning of a "right to payment" is nothing more or less than an enforceable obligation, *regardless of the objectives the State seeks to serve in imposing the obligation.*

495 U.S. at 559 (emphasis added). And in *Kovacs*, *supra*, the Court similarly held that an environmental clean-up injunctive order that had been reduced to a monetary payment obligation was also a "debt" under the Code. 469 U.S. at 278-81. The argument that the license payment obligation here is not a "debt" cannot be reconciled with *Davenport* and *Kovacs*.

b. The FCC next argues that § 525 does not apply because respondent's debt is not "dischargeable" in the bankruptcy case. It is not dischargeable, the FCC contends, because it is a regulatory condition the bankruptcy court lacks authority to alter. FCC Br. 32-34. As the FCC puts it, "[t]he bankruptcy court had no more authority to allow respondents to retain the licenses despite failure to make timely payments than the court could void other regulatory provisions of respondents' licenses, such as the requirement that they actually build out a communications network by the prescribed deadline." FCC Br. 32-33.

That argument is a non sequitur. An obligation to pay money is a "debt" within the meaning of § 525; a network build-out requirement is not. The fact that a bankruptcy court could not "discharge" a build-out schedule that is not a "debt" says nothing about whether the court can discharge a payment obligation that plainly *is* a "debt" under § 525. For example, even though a government education loan

might include obligations – such as draft registration – beyond the authority of a bankruptcy court to excuse, that fact does not automatically render the loan repayment obligation beyond the court's power to discharge in bankruptcy. *See* 11 U.S.C. § 523(a)(8) (government education loan not excepted from discharge if exception would cause debtor undue hardship). Merely describing a debt as a regulatory condition, in other words, does not put the debt on a par with all other regulatory conditions of the license in respect to dischargeability.

c. Finally, the FCC contends that because it had a regulatory reason underlying its decision to allow respondent to retain the licenses only so long as it made timely installment payments, the revocation of the licenses was not, in fact, "solely because of" respondent's failure to pay. FCC Br. 36-38. That argument is also incorrect.

The FCC actually makes two distinct claims on this point. First, it argues that the existence of an underlying regulatory purpose behind the revocation establishes that the FCC did not revoke the licenses *solely* because of the failure to make a timely payment, but for that reason *and* whatever reasons lay behind it. FCC Br. 37-38. This contention confuses the subjective-intent-based concept of *motive* or *animus* with the objective question of *causation*, which is all that this aspect of § 525 is directed to. The FCC's contention is akin to the argument long rejected in the Title VII customer preference cases. The employers in those cases claimed that while they had refused to hire certain employees on the basis of race, their *motive* in doing so was not animus or hostility to racial minorities, but to accommodate the preferences of customers, who would not want to deal with minority employees. That argument failed: the question in those cases was not whether the employer had a non-race-based reason for refusing to hire minority employees, but simply whether race was the criterion the employer used to

deny employment. *See, e.g., Village of Bellwood v. Dwivedi,* 895 F.2d 1521, 1530 (7th Cir. 1990) (Posner, J.) ("Suppose a merchant refuses to hire black workers not because he is racist but because he believes that his customers do not like blacks and will take their business elsewhere if he hires any. The refusal is nevertheless discrimination, because it is treating people differently on account of their race."); *cf. Palmore v. Sidoti*, 466 U.S. 429 (1984) (use of prohibited classification, regardless of motive behind it, triggers heightened judicial scrutiny); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (similar).

Similarly, even if the FCC had distinct, good-government motives *behind* its revocation of the licenses, the undisputed fact is that respondent's failure to make timely payment on a dischargeable debt was the sole criterion that triggered revocation of the licenses. That is, regardless of respondent's financial position or ability to use the network, the FCC would not have revoked respondent's licenses had it made timely payments. And conversely, even if respondent had an unparalleled financial position and first-rate spectrum utilization, the FCC's rule still would have required revocation of its licenses had respondent failed to make a single timely payment. Accordingly, the licenses were revoked "solely because" respondent failed to make payments, regardless of the motivations the FCC had for acting solely on that basis.[8]

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[8] By similar analogy to employment discrimination cases, Arctic Slope argues that the existence of a regulatory purpose renders this a "mixed motives" situation, and that addition of the word "solely" before "because of" in § 525 excludes such situations from § 525's ambit. Arctic Slope Br. 25. Arctic Slope is wrong. The so-called "mixed motives" situation arises where the defendant actually acted against the individual on the basis of two or more criteria – i.e., gender and personality – and the question is whether the proscribed criterion can be said to have truly *caused* the adverse action. *E.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality op.); *id.* at 284 (Kennedy, J., dissenting). No such problem of causation arises where the defendant indisputably acts on the basis of just *one* impermissible criterion, but asserts that the one criterion is a statistical proxy for other, permissible motives. In that instance there is only one "cause," though there may be many motives. Thus, even if the word "solely" appeared in Title VII, the outcome in customer preference cases would be the same, for there is only one "cause" in those cases – though "mixed motives" cases might be evaluated differently, since they really involve mixed *causes*. Conversely, the word "solely" is not superfluous under the D.C. Circuit's reading of § 525, as Arctic Slope contends, Br. 25: its use in § 525 bars agencies from revoking a license solely for failure to make a payment, but operates to *allow* them to revoke a license *even on that basis*, so long as other conditions also justify revocation. *See infra* at 28-29 (discussing additional factors on which FCC could have based revocation of license).

Second, the FCC argues that § 525 erects only a barrier to "discrimination" against licensees in bankruptcy, and that because other licensees *not* in bankruptcy would also lose their license for failure to make payments, there is no "discrimination" against bankrupt licensees and, hence, no violation of § 525. FCC Br. 37. The problem for the FCC is that the plain language of § 525 is not limited to barring "discrimination" against license-holders simply "for entering bankruptcy." FCC Br. 37. *In addition to* that general prohibition against anti-bankruptcy animus, the text of § 525 *also* bars the government from using the failure of a bankrupt licensee to make a debt payment as the sole basis for revoking its license. *See* S. Rep. No. 95-989, at 81 (§ 525 extends to "discrimination *or other action* based solely on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge, *or* on the basis of nonpayment of a debt discharged in the bankruptcy case") (emphasis added). If § 525 is to this extent a form of affirmative protection for licensees in bankruptcy that is unavailable to other, non-bankrupt licensees, it is merely the kind of affirmative protection for debtors in bankruptcy the entire Code exists to provide. It assuredly does not render the plain terms of § 525 inoperative.

2. The FCC's efforts to escape the force of § 525 on the basis of its asserted "regulatory purposes" fail not only the terms of § 525's text and recent history, but also the holding of *Perez v. Campbell*, 402 U.S. 637 (1971), which the provision was intended to elaborate. The only material difference between *Perez* and this case is that in *Perez*, the government revoked a license for failure to pay a *private* debt, whereas here the debt was to the FCC in exchange for the license itself. But in fact that is no difference at all, as closer scrutiny of the FCC's rationale for revoking the license reveals.

The FCC in this case argues that revoking the license for failure to make timely payments was the only way it could ensure "best use of the spectrum in the public interest." FCC Br. 40. Even accepting that dubious proposition as true for the moment, *but see infra* at 28-29, that rationale presumably would apply equally to a licensee's failure to make timely payments *to its own private creditors*: in either instance, the failure to pay would reflect financial weakness potentially undermining the licensee's ability to put the spectrum to full use. Thus the FCC's justification for revoking respondent's licenses for nonpayment of a dischargeable debt to the FCC necessarily would also authorize it to revoke a license for failure to pay *any* debt that is dischargeable in bankruptcy. And that is exactly what § 525 prohibits, if its plain text, and this Court's holding in *Perez*, mean anything at all.

3. Finally, the natural meaning of § 525's text is not inconsistent with the Communications Act policies the FCC cites as justification for adopting a different interpretation – which is among the reasons why Congress did not see fit to recast the statutory balance in the way the FCC now urges.

Section 309(j) of the Communications Act encourages the FCC to consider the use of methods like installment payment plans to facilitate the participation of small businesses in the auction processes and, ultimately, to promote diversity of spectrum ownership. 47 U.S.C. § 309(j)(3)&(4).

That policy would be thwarted, the FCC says, if § 525 prohibits it from revoking licenses when installment payment obligations are not met.

The FCC's argument misapprehends both § 309(j) and § 525. It is perfectly clear that nothing in § 309(j) required the FCC to use installment plans without guaranteed credit. The FCC's own brief recognizes that Congress directed the FCC only to "'*consider* alternative payment schedules and methods of calculation, including lump sums or *guaranteed* installment payments' to promote small business participation." FCC Br. 48 (emphasis added) (quoting 47 U.S.C. § 309(j)(4)(A)). More to the point, nothing in § 309(j) required the FCC to use the failure to make timely payments as *the conclusive proxy* for its regulatory goals of ensuring optimal spectrum usage. Even taken on its own terms, the FCC's assertion that § 309(j) encouraged use both of installment payments and of the presumption that the highest bidder was the "best" spectrum user, FCC Br. 40, provides no support for the FCC's decision to condition revocation of licenses merely on the *timeliness* of installment payments made by the highest bidder. That was a decision voluntarily made solely by the FCC, strongly influenced no doubt by its pecuniary interest in obtaining payments for the federal Treasury. Section 309 does not say – or imply – that the FCC not only ought to allow installment payments, but also ought to revoke licenses when such payments are not timely. Accordingly, enforcing the text of § 525 to prevent the FCC from revoking a license solely for violation of a payment timing condition poses no conflict at all with § 309(j).

The FCC also errs in its estimation of the scope of § 525. The FCC complains that, as interpreted by the D.C. Circuit, § 525 would "force an agency to give an exclusive license to a business that fails to meet a key regulatory requirement for maintaining the license," setting up the conflict with § 309(j). FCC Br. 42. Not so. It was the FCC's own deci-

sion to make timely installment payments the *only* "key regulatory requirement for maintaining the license." Having chosen to so limit itself, the FCC subjected its control over possession of licenses to the restrictions of § 525.

That choice was not compelled by § 525. Section 525 absolutely does not bar government agencies making licensing decisions from "consideration of other factors, such as future financial responsibility or ability." S. Rep. No. 95-989, at 81. Nor does it

> extend so far as to prohibit examination of the factors surrounding bankruptcy, the imposition of financial responsibility rules if they are not imposed solely on former bankrupts, or the examination of prospective financial condition or managerial ability .... [I]n those cases where the causes of a bankruptcy are intimately connected with the license ... in question, an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy.

H.R. Rep. No. 95-595, at 165 (1978). Accordingly, an agency may revoke the license of a debtor in bankruptcy so long as the trigger for revocation is something *other than* the debtor's mere presence in bankruptcy or mere failure to make a dischargeable debt payment. *See, e.g., Duffey v. Dollison*, 734 F.2d 265, 272-74 (6th Cir. 1984) (upholding application to debtor in bankruptcy of law requiring suspension of driver's license where driver has failed to pay judgment *and* failed to post proof of financial responsibility); *In the Matter of Bradley*, 989 F.2d 802, 804 (5th Cir. 1993) ("Section 525 does not prohibit a state from denying or revoking a license based upon a determination that the public safety would be jeopardized by granting or allowing continued possession of the license, but it does prohibit a state from exacting a discharged debt as the price of receiving or

retaining a license."); *In re Colon*, 102 B.R. 421, 428 (Bankr. E.D. Pa. 1989) ("If state law mandates the suspension or revocation of driving privileges due to the nature of the infraction or the driver's history of traffic violations, irrespective of whether the driver promptly pays a fine, the bankruptcy code will not interfere with the exercise of the police power.").

There are numerous ways the FCC in this case could have avoided the force of § 525 by connecting the regulatory requirements for maintaining licenses more tightly to its true regulatory interests in spectrum usage, and less tightly to its pecuniary interests in simply enforcing payment obligations. For example, the FCC could have conditioned possession of licenses on satisfaction of periodic network build-out obligations. The FCC could have imposed financial requirements other than payment obligations, such as the financial responsibility rules specifically suggested in the committee reports accompanying the Code. The FCC could even have conditioned license-holding on occasional totality-of-the-circumstances inquiries into a licensee's continued fitness to hold a license, which could have permissibly included an "examination into the circumstances surrounding bankruptcy." H.R. Rep. No. 95-595, at 165.

Enforcement of those or similar regulatory requirements for licensees would have allowed the FCC to fully serve the goals of § 309(j) without running into any § 525 limitations whatsoever. What the FCC could *not* do was to make mere failure to pay a dischargeable debt the sole, blanket proxy for *all* of its regulatory considerations. As Congress has already implicitly determined, the fact that the FCC voluntarily chose to serve its § 309(j) goals by a mechanism that would trigger § 525's protections for licensees is no reason to disregard those protections.

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